Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 25 JULY 31, 1991 No. 31

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

(T.D. 91-62)

APPROVAL OF GENERAL MARITIME CORP. AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of General Maritime Corp. as a commercial gauger.

SUMMARY: General Maritime Corp. of Stamford, Connecticut recently applied to Customs for approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that General Maritime Corp. meets all of the requirements for approval as a commercial gauger.

Therefore, in accordance with Part 151.13 (f) of the Customs Regulations, General Maritime Corp., Two Stamford Landing, Southfield Ave., Stamford, Connecticut 06902 is approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: July 8, 1991.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, D.C. 20229 (202-566-2446).

Dated: July 11, 1991.

LYAL V.S. HOOD,
Acting Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, July 16, 1991 (56 FR 32467)]

U.S. Customs Service

General Notice

DUTIABILITY OF "ROYALTY" PAYMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Extension of deadline for submitting comments on HRL 544436

EFFECTIVE DATE: Immediately.

FOR FURTHER INFORMATION CONTACT: Tom Lobred or Virginia Brown, Value and Marking Branch, Office of Regulations and Rulings, (202) 566-2938.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In a General Notice, dated June 6, 1991, published in the June 19, 1991 CUSTOMS BULLETIN (25 Cust. Bull. 25, at p. 8) Customs solicited comments on the holding in Headquarters Letter Ruling (HRL) 544436. In HRL 544436, Customs held that payments made by the buyer to the seller were not dutiable under section 402 (b)(1)(D) of the Trade Agreements Act of 1979 (19 U.S.C. 1401a; TAA); however, the payments were dutiable as proceeds of a subsequent resale under section 402(b)(1)(E) of the TAA.

The comment period was set for 30 days from the date of publication. Thus, the comment period is to expire on July 19, 1991. Several interested parties have requested that Customs extend the comment period.

ACTION:

The deadline to submit comments on the holding in HRL 544436 is extended until September 3, 1991.

Dated: July 18, 1991.

JOHN B. O'LOUGHLIN,
(for Sam Banks, Assistant Commissioner,
Commercial Operations.)

U.S. Customs Service

Proposed Rulemaking

ERRATA

19 CFR Parts 19, 113, and 144

RIN-1515-AA22

PROPOSED CUSTOMS REGULATIONS AMENDMENTS RELATING TO DUTY-FREE STORES; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; correction; extension of comment period.

SUMMARY: The Customs Service is correcting a number of typographical errors and omissions, and extending the period of time within which comments may be submitted, with respect to the notice of proposed rulemaking on duty-free stores, which appeared in the Federal Register on May 17, 1991 (56 FR 22833). That document proposed to amend the Customs Regulations to designate duty-free stores as a new class of customs bonded warehouse, establish procedures for their administration, and incorporate these procedures in the Regulations, such changes being necessary to implement § 1908 of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100-418).

DATE: Comments must be received on or before August 15, 1991.

ADDRESS: Comments (preferably in triplicate) may be addressed to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue NW., Room 2119, Washington, D.C. 20229. All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9:00 a.m. and 4:30 p.m. on normal business days, at the address above.

FOR FURTHER INFORMATION CONTACT: Russell Berger, Regulations and Disclosure Law Branch, (202-566-8237).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Duty-free stores are essentially Customs bonded warehouses wherein merchandise is offered for sale to departing travelers without payment

of Customs duties and taxes, on condition that the merchandise will be exported by and with them from the United States. At present, there are approximately 125 such stores operating throughout the U.S., 43 of which are on the Canadian border, 33 at the Mexican border, and 49 at U.S. international airports. Duty-free stores were first established by Customs in the late 1950's and have been administered since their inception under Customs directives, rather than under any specific law or regulation.

A document published in the Federal Register on May 17, 1991 (56 FR 22833) proposed to amend the Customs Regulations to include duty-free stores as a new class of Customs bonded warehouse together with specific procedures for their administration. These changes were necessary to implement § 1908 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100-418).

Comments on this proposed rulemaking were to have been received on or before July 16, 1991. Customs has, however, received a request from a trade association to extend this period, the association basically stating that it needs additional time to coordinate a meaningful comment with its membership. Customs believes, under the circumstances, that the request has merit. Accordingly, the period of time for the submission of comments is being extended as indicated.

In addition, the proposed rulemaking contained a number of typographical errors and omissions which are corrected as set forth below.

CORRECTIONS

1. On page 22834, column 1, line 21, under item "2", "not" is corrected to read "now".

2. In § 19.36(e), on page 22838, column 1, line 51, "form" is corrected to read "from".

3. In the second sentence of § 19.37(a), on page 22838, second column, line 18, "§ 19.39(b)" is corrected to read "§ 19.39(a) and (b)".

4. In § 19.39(c)(4)(i), on page 22839, column 2, line 30, "not" is corrected to read "no".

5. The third sentence of the conclusory text of § 144.37(h)(2) following paragraph (vi), on page 22840, second column, line 15, which reads, "A permit file copy will be attached to the parcel containing the purchaser." is corrected to read as follows: "A permit file copy will be attached to the parcel containing the articles, and the original given to the purchaser."

6. The phrase "last date" appearing in the third sentence of the conclusory text of § 144.37(h)(3) following paragraph (vi), on page 22840, second column, line 49, is corrected by removing the word "last".

Dated: July 16, 1991.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

[Published in the Federal Register, July 23, 1991 (56 FR 33733)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Judges

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91-55)

PPG INDUSTRIES INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND VITRO FLEX, S.A. AND CRISTALES INASTILLABLES DE MEXICO, S.A., DEFENDANT-INTERVENORS

Court No. 86-12-01546

Held: Commerce's remand determination is sustained. Plaintiff's motion seeking a new remand is denied. Defendant's cross-motion for judgment sustaining the determination of Commerce in *Fabricated Automotive Glass From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44,652 (Dec. 11, 1986), as supplemented by the results of prior remands, is granted. [Action dismissed.]

(Decided July 3, 1991)

Stewart and Stewart, (*Terence P. Stewart* and *David Scott Nance*), on the motion, for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch *(Velta A. Melnbrencis)*, and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Diane McDevitt*, Attorney-Advisor), of counsel, on the motion, for defendant.

Brownstein, Ziedman and Schomer, (*Irwin P. Altschuler, David R. Amerine*, and *Claudia G. Pasche*), on the motion, for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

CARMAN, *Acting Chief Judge:* Plaintiff moves pursuant to Rules 1 and 7(f) of this Court to reject the remand determination of the United States International Trade Administration, United States Department of Commerce ("ITA" or "Commerce") in *Results of Reconsideration of Issues Pursuant to Court Remand of PPG Industries, Inc. v. United States, Court No. 86-12-01546* (Oct. 25, 1990) *("Remand Results")*, filed pursuant to this Court's order of August 9, 1990. The remand order directed Commerce to recalculate certain countervailable benefits which Commerce determined were bestowed on account of FOMEX[1] export loans in its *Fabricated Automotive Glass from Mexico; Final Results of Countervailing Duty Administrative Review ("Final Results")*, 51 Fed. Reg. 44,652 (Dec. 11, 1986). Plaintiff seeks a new remand. Defendant opposes the motion and cross-moves for judgment sustaining the determination of Commerce in the *Final Results*, as supplemented by the results of the prior remands. Defendant-Intervenors join defendant's opposition to the motion of plaintiff and seek its dismissal.

[1] FOMEX (Fund for the Promotion of Exports of Mexican Manufactured Products) is a trust established by the Government of Mexico to promote the manufacture and sale of exported products.

BACKGROUND

In *PPG Industries, Inc. v. United States,* 14 CIT ____, 746 Fed. Supp. 119 (1990), this case was remanded to the ITA with instructions to (1) determine an effective benchmark interest rate for comparison with the 1984 FOMEX export loans and recalculate the subsidy amount, if necessary; (2) reexamine the 1985 benchmark interest rate to ascertain which finance charges, if any, were included in the quarterly weighted-average interest rates Commerce relied upon in calculating its 1985 benchmark rate; and (3) determine whether or not the Federal Reserve effective rates that Commerce used in constructing the 1985 benchmark rate accounted for compensating balances and recalculate the subsidy amount, if necessary. The final determination of Commerce was affirmed by this Court in all other respects.

DISCUSSION

Standard of Review

Commerce's determination must be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). The "substantial evidence" standard used by the Court to determine whether the agency's findings are supported by law contemplates "essentially a limited review of the agency determination, insuring that the agency conclusions are reasonably drawn from some evidence, more than a mere scintilla, in light of the record as a whole." *Alhambra Foundry v. United States,* 9 CIT 632, 635, 626 F. Supp. 402, 407 (1985).

As a general rule this Court will accord substantial deference to Commerce's implementation of its statutory mandate. *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450–51 (1978). An agency's interpretation of a statute which it is authorized to administer is "to be sustained unless unreasonable and plainly inconsistent with the statute, and [is] to be held valid unless weighty reasons require otherwise." *ICC Indus. v. United States,* 5 Fed. Cir. (T) 78, 84, 812 F.2d 694, 699 (1987) (quoting *Melamine Chemicals, Inc. v. United States,* 2 Fed. Cir. (T) 57, 60–61, 732 F.2d 924, 928 (1984). To satisfy this standard it is not necessary for a court to find that the "[agency's] construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n v. Aragon,* 329 U.S. 143, 153 (1946); *see Consumer Prod. Div., SCM Corp. v. Silver Reed America, Inc.,* 3 Fed. Cir. (T) 83, 90, 753 F.2d 1033, 1039 (1985).

1. *Commerce's recalculation of the 1984 FOMEX export loan benefits utilizing effective interest rates:*

Commerce agreed with plaintiff's motion for a remand to recalculate the benefits of 1984 FOMEX preferential loans and requested a remand to reexamine the benefit conferred by 1984 FOMEX dollar-denominated export loans. *Remand Results* at 2. In accordance with the remand instructions Commerce recalculated the FOMEX export loan benefit for 1984.[2] This Court finds that Commerce properly recalculated the 1984 FOMEX export loan benefits utilizing the effective interest rates, and that its findings are supported by substantial evidence on the record and are in accordance with law.

2. *Commerce's determination that the 1985 Federal Reserve interest rates did not include compensating balances and additional fees and costs:*

On remand, Commerce noted that the commercial lending rates published in the Federal Reserve Bulletin, which Commerce used in deriving its 1985 benchmark, "represent[ed] effective interest rates and were obtained from a survey of 340 commercial banks of all sizes." *Remand Results* at 4. It concluded, based on this survey, that "these effective rates do not include non-rate costs to the borrower, additional fees or finance charges." *Id.* With respect to compensating balances, Commerce determined that:

> compensating balances are not included in the 1985 Federal Reserve effective rate (citation omitted). Plaintiff has not provided any information to indicate that there are compensating balances for dollar-denominated FOMEX loans in Mexico.
>
> * * * * * * *
>
> Based on the information we have reexamined, we do not believe that a change in our 1985 effective benchmark for FOMEX dollar-denominated export loans is required.

Id. With respect to additional charges and fees, the ITA indicated that the information provided by the Division of Monetary Affairs of the Federal Reserve System demonstrated that the quarterly weighted-average

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[2] On remand, Commerce stated:

> [W]e have recalculated the benefit from all of the relevant FOMEX export loans granted in 1984, comparing effective preferential rates with effective benchmark interest rates applicable to this period.
>
> For its effective rate benchmark, the Department used the same benchmark as in the final results before this Court, the weighted-average interest rate derived from the Federal Reserve Bulletin quarterly survey of bank lending rates.
>
> * * * * * * *
>
> In order to compare the effective rate benchmark from the Federal Reserve with the FOMEX preferential dollar rates, we had to derive equivalent effective rates from the nominal FOMEX rates. Since interest on these loans is prepaid and we have no evidence of any charges on these loans other than interest, we calculated the effective FOMEX preferential rates by using the nominal FOMEX rates and taking into account the cost of prepayment of interest. On this basis, we determine the benefit from the two FOMEX export loans granted in 1984 to be 1.03 percent *ad valorem* for all companies, a rate lower than the 1.20 percent *ad valorem* for all companies determined in the final results before this Court.

Remand Results at 2–3.

Federal Reserve rates used by the ITA to calculate the 1985 effective benchmark did not include the effect of additional charges or fees. *Id.* at 6.

This Court has previously sustained the practice of Commerce of calculating benchmark rates from information obtained from the United States Federal Reserve Board in *Cementos Anahuac del Golfo, S.A. v. United States,* 12 CIT 525, 555, 689 F. Supp. 1191, 1214 (1988), *aff'd,* 879 F.2d 847 (1989), *cert. denied,* 110 S. Ct 1318 (1990). Although plaintiff does not challenge ITA's use of Federal Reserve Bulletin effective interest rates, it nevertheless contends that in its remand determination the ITA should have included compensating balances and additional fees, finance charges, and other non-rate costs to the borrower in the 1985 benchmark rate. Plaintiff's Motion for Remand on FOMEX Export Loan Issue ("Plaintiff's Motion") at 2–3.

According to plaintiff, the record established that compensating balances were a "common feature" of short-term commercial loans in the United States in 1985 and that compensating balances of as much as twenty percent of the amount of a loan could be required. In support of its argument, plaintiff refers this Court to a report titled *FFO United States* ("FFO Report" or "Report"), a financial journal published in April 1985 by the Business International Corporation. *See* Administrative Record Document ("A.R. Doc.") 59 at frames 726, 812–13. Furthermore, plaintiff asserts that the ITA has "consistently" made adjustments to benchmark interest rates to reflect compensating balance requirements where such requirements occur, citing *Ceramic Tile from Mexico; Final Results of Countervailing Duty; Administrative Review,* 53 Fed. Reg. 15,090, 15,091 (Apr. 27, 1988), and, therefore, the ITA abdicated its duty to investigate by failing to determine whether a similar adjustment was necessary for both its 1984 and 1985 benchmarks. *Plaintiff's Memorandum* at 3.

Defendant maintains that the determination by Commerce not to include adjustments for compensatory balance requirements and additional finance charges was reasonable, in accordance with law, and supported by substantial evidence on the record. Defendant's Memorandum in Opposition to Plaintiff's Motion for Remand on the FOMEX Export Loan Issue ("Defendant's Memorandum") at 3. Defendant points out that the FFO Report, relied on by plaintiff, advised that the compensating balance rule is flexible and depends upon monetary conditions. Furthermore, defendant claims that the twenty percent compensating balance requirement cited in the FFO Report was merely an estimate and offered no explanation of how the number was derived. *Defendant's Memorandum* at 6. The arguments of defendant-intervenors' closely parallel those of defendant.

This Court finds that the remand determination of Commerce with respect to the 1985 benchmark is reasonable, is supported by substantial evidence on the record, and is otherwise in accordance with law. This Court observes that Commerce, in deriving its 1985 benchmark,

relied upon Federal Reserve data which was based on a national survey of 340 United States banks. In contrast, the FFO Report relied upon by plaintiff contains estimates and refers to compensating balances as only one of several ways that banks secure loans. In any event, the contents of the FFO Report do not contradict the substantial record evidence relied upon by Commerce. For instance, the Report indicates that "*[s]ome* banks also require compensating balances or fees for providing the loan. Compensating balances range from 10% to 20%, but are often waived for prime customers; fees generally range from 0.25% to 1%, but especially creditworthy firms may receive better credit terms." A.R. Doc. 59 at frame 813 (emphasis added). The Report also indicates that "major banks now offer top-rated customers an option of pricing their loans on the basis of prime plus a premium without compensating balances." *Id.* at frame 812.

This Court finds that the ITA gave adequate consideration to the issues raised by plaintiff in its remand determination. The ITA correctly points out that the information in the record cited by plaintiff demonstrates that compensating balances may be required for high risk customers only. *Remand Results* at 6. Furthermore, the FFO Report indicates that the costs of loans vary with the size of the loan and the creditworthiness of the borrower, and that large creditworthy borrowers could effectively bargain for loans. In short, such borrowers could secure loans below the prime rate and presumably bargain away costs such as compensating balance requirements, discounts, points, etc. Based on the foregoing, the ITA reasonably concluded that adjustments to its 1985 benchmark to include the effect of compensatory balances and additional charges or fees were not warranted.

CONCLUSION

In accordance with this Court's remand instructions, Commerce recalculated the benefit from the dollar-denominated FOMEX export loans granted in 1984 by comparing effective preferential rates with effective benchmark interest rates applicable to this period. Commerce also determined that adjusting its 1985 benchmark to include the effects of compensating balances and additional charges or fees was not warranted because the Federal Reserve rates used to calculate the 1985 effective benchmark did not include the effects of compensating balances and other charges. or the reasons stated in this opinion, these determinations are responsive to this Court's remand instructions, are supported by substantial evidence on the record, and are in accordance with law. Consequently, plaintiff's motion seeking a new remand is denied. Defendant's cross-motion is granted. The determination of Commerce in the *Final Results,* as supplemented by prior remands, is sustained. This action is dismissed.

(Slip Op. 91-56)

AMERICAN GRAPE GROWERS ALLIANCE FOR FAIR TRADE, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 84-4-00575

[Plaintiff's motion to reinstate judgment of reversal is denied, and matter is remanded to ITC for determination in accordance with this opinion.]

(Decided July 10, 1991)

Katten Muchin Zavis & Dombrof (*Thomas A. Rothwell, Jr., Joseph A. Vicario, Jr.,* and *James M. Lyons*) for plaintiff.

Wayne W. Herrington, Office of General Counsel, United States International Trade Commission, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *David Cohen,* Commercial Litigation Branch, Civil Division, U.S. Department of Justice for defendant.

Buchman, Schreiber, Macknight, Buchman & O'Brien *(T. Raymond Williams)* for Wellington Importers.

Covington & Burling *(O. Thomas Johnson, Jr.)* for Banfi Products Corp.

Howrey & Simon *(Herbert C. Shelley)* for defendant-intervenor Joseph E. Seagram & Sons, Inc.

Barnes Richardson & Colburn *(James H. Lundquist)* for defendant-intervenor Moet-Hennessy U.S. Corp.

Arnold & Porter *(Thomas Wilner)* for defendant-intervenor Brown-Forman Corp.

MEMORANDUM OPINION AND ORDER

WATSON, *Senior Judge:* This case is before the court pursuant to an April 17, 1986 order of the Court of Appeals for the Federal Circuit (CAFC) remanding the case for reconsideration, and instruction this court to vacate its judgment granting plaintiff's motion for summary judgment.[1] The action challenged negative preliminary determinations of the International Trade Commission (ITC) at the first stage of countervailing duty and antidumping investigations of ordinary table wine form France and Italy.[2]

BACKGROUND

On January 27, 1984, petitions were filed with the ITC and the United States Department of Commerce on behalf of the American Grape Growers Alliance for Fair Trade. The parties alleged that imports of certain table wines from France and Italy were being subsidized, and sold in the United States at less than fair value. The ITC accordingly instituted preliminary countervailing duty and antidumping investigations

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[1] *American Grape Growers Alliance for Fair Trade v. United States,* 9 C.I.T. 396, 615 F. Supp. 603 (1985).

[2] Investigations Nos. 701-TA-210 and 211 (Preliminary) and 731-TA-167 and 168 (Preliminary), USITC Publ. 1502, 49 Fed. Reg. 10,587 (1984).

pursuant to §§ 703(a) (19 U.S.C. § 1671b(a)) and 733(a) (19 U.S.C. § 1673b(a)) of the Tariff Act of 1930.[3]

On March 21, 1984, the ITC issued its negative preliminary determination, finding no "reasonable indication that an industry in the United States is materially injured, or threatened with material injury, nor is the establishment of an industry in the United States materially retarded, by reason of imports from France and Italy of certain table wine * * * which are alleged to be subsidized [or] sold in the United States at less than fair value." 49 Fed. Reg. 10,587 (1984). As a result, Commerce terminated its investigation of ordinary table wine from Italy and France.

On April 19, 1984, plaintiffs filed a complaint before this court in response to the ITC's determination. The plaintiffs consist of cooperatives and associations involved in the production of ordinary table wines, [4] are parties to these antidumping and countervailing duty proceedings before Commerce and the ITC, and are "interested parties" within the meaning of 19 U.S.C. §§ 1677 (9)(c) and 1677(9)(E).[5]

In their complaint, plaintiffs allege that the ITC's determinations are arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and not in accordance with law, in that:

> – the ITC imposed a standard of proof that is inappropriate and excessive in comparison to the statutory requirements of 19 U.S.C. §§ 1671b(a) and 1673b(a), and failed to appropriately consider plaintiffs' *prima facie* case.
>
> – the ITC's determinations were not based on the best evidence available, as required by the statute, and that it failed to consider all information, including accessible, publicly available data, and failed to consider the requisite thorough investigation.
>
> – the questionnaires used by ITC to elicit relevant data were fatally flawed because they failed to clearly specify the information sought.

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[3] 19 U.S.C. §§ 1671b(a) and 1673b(a) state:

> Except in the case of a petition dismissed by the administering authority * * *, the Commission, within 45 days after the date on which a petition is filed under * * * this title or on which it receives notice from the administering authority of an investigation commenced under * * * this title, shall make a determination, based upon the best information available to it at the time of the determination, of whether there is a reasonable indication that –
>
> (1) an industry in the United States –
>
> (A) is materially injured, or
>
> (B) is threatened with material injury, or
>
> (2) the establishment of an industry in the United States is materially retarded, by reason of imports of the merchandise which is the subject of the investigation by the administering authority. If that determination is negative, the investigation shall be terminated.

[4] In ruling on a motion to dismiss, the court found that "grape growers were not part of the industry for the purpose of an investigation of injury to the table wine industry and were not interested parties within the meaning of the law." *American Grape Growers Alliance for Fair Trade v. United States*, 9 C.I.T. 103, 105, 604 F. Supp 1245, 1248 (1985). Defendant's motion to dismiss was granted as to those plaintiffs who were primarily grape growers, and whose grapes "are utilized to a significant extent for other purposes [than] the production of table wine." *Id.* Remaining plaintiffs are Allied Grape Growers, Sun-Diamond Growers of California, the California Association of Wine Grape Growers, the Gibson Wine Company, and Guild Winery and Distillers.

[5] Section 1677, in peninent part, defines an "interested party" as:

> (C) a manufacturer, producer, or wholesaler in the United States of a like product, [and]
>
> (E) a trade or business association, a majority of whose members manufacture, produce, or wholesale a like product in the United States.

—the ITC erroneously placed on plaintiffs the burden of proof to provide it with all necessary information.

—the ITC erroneously confined its analyses of import penetration and price to data covering a three year period, notwithstanding that information covering a longer period was before it, and that the ITC had examined a longer period of time considering other relevant criteria.

—the ITC erroneously determined that the volume and market share of the subject table wine imported from France are very small and not a cause of the domestic industry's financial problems, which it admits exist, and because the ITC failed to find that the volume of imports, or any increase in that volume, is significant, pursuant to 19 U.S.C. § 1677(7)(C)(i).

—in reaching its negative determination regarding underselling or price suppression by reason of imports from France and from Italy, the ITC failed to use the best information available, and ignored the 19 U.S.C. § 1677(7)(C)(ii) requirement that the ITC consider the effect of imports in depressing or suppressing price increases which would have occurred otherwise.

—the ITC's determination that the market share held by wines from Italy is flat and not a cause of tbe domestic industry's financial problems, which the ITC admits exist, are not in accordance with 19 U.S.C. § 1677(7)(C)(i), which directs the commission to consider whether the volume of imports is significant in absolute terms, or relative to production or consumption in the United States.

—in reaching its determination, the ITC placed undue emphasis on the existence of underselling and lost sales to the exclusion of other indicia of injury, and neglected its duty to consider all factors affecting the domestic industry.

—the ITC erroneously determined that decline in the domestic prices was solely attributable to competition between domestic wineries, and not the resul of imports of ordinary table wine from Italy and France subsidized and sold at less than fair value.

—the ITC erroneously determined not to cumulate the impact on the domestic industry of imports from Italy and France, based on conclusions that ordinary table wines from Italy and France are not alike, and not marketed to the same customers through the same distribution system.

—the ITC erroneously excluded domestic growers of grapes used to produce ordinary table wine.

—the ITC failed to give suffcient weight to the legislative direction that antidumping and countervailing duty cases involving agricultural products are to be accorded special treatment due to their unique situation.

—the ITC erroneously determined that shipments by domestic wineries increased during the period investigation, because the ITC ignored shipment volume data pertaining to the like product produced in the United States, and instead used information on a broader product category, which includes categories of wine

excluded from the investigations by its own definition of "like product."

– the ITC erroneously deterrmined not to exclude certain domestic producers of ordinary table wine that also import the same from Italy and France.

– the ITC failed to consider the market penetration achieved by ordinary table wine imported from Italy; the rapid growth in imports of ordinary table wines from France; the continuing decline in consumption in Italy and France; and the increase in wine production in Italy and France, and erred in concluding that the financial prospects for the domestic industry are favorable despite present, financial losses; loss of market share; reduced shipments; lower employment levels; increased costs; and declining prices.

On August 8, 1985, this court granted plaintiffs motion for summary judgment.[6] In reaching its ruling on plaintiffs motion and defendants' cross-motion for summary judgment brought under Rule 56.1,the court determined that there were two basic issues to decide.[7] The two issues were identified as (1) "whether or not the ITC should have combined or 'cumulated' the imports of table wine from France and Italy, instead of examining them separately; [and] (2) whether or not the ITC applied an erroneous legal standard in determining that there was no 'reasonable indication' of injury or threat of injury." The court held that: (1) the ITC erroneously failed to consider imports from France and Italy in a cumulated manner, and (2) the ITC applied too stringent a standard in determining whether there was a reasonable indication of injury, or threat of injury.

The court found that the ITC based its determination not to cumulate "on a conclusion that the imports from Italy and France did not exhibit a collective 'hammering' effect on domestic wine prices." *American Grape Growers Alliance for Fair Trade v. United States,* 9 C.I.T. 396, 398, 615 F. Supp. 603, 605 (1985) (American Grape Growers). That result was based on the finding that "French imports were concentrated in the traditional white wine category while most of the Italian wines were of an effervescent type," and that "the imports were generally marketed by separate groups of importers." *Id.* The ITC's decision not to cumulate was found to be erroneous "because it depended on a depth of analysis and specificity of information * * * unreasonable to expect, and unlawful to demand, in the preliminary phase of the investigation." *Id.*[8]

The court also found that the ITC was erroneous in applying a more rigorous standard of competition for cumulation of imports subject to investigation than that used for matching the domestic product with the imported one, and that it was error for the ITC to distinguish the Italian

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[6] 9 C.I.T. 396, 615 F. Supp. 603 (1985).

[7] Other issues were previously decided when the court found that certain plaintiffs did not have standing to challenge the ITC's determinations, and dismissed them from the action. *See supra* note 4.

[8] This reasoning is linked to the Court's determination on the other issue determined, regarding the ITC's application of too stringent standards. Thus, this reasoning also may fail now, pursuant to *American Lamb Co. v. United States.* 785 F.2d 994 (Fed. Cir. 1986).

effervescent table wine from the traditional table wine. "If imported articles match the definition of the 'like product'," and this court found that the wines in question did, "they should be considered together and further distinctions based on national origin or variations in character are artificial and irrelevant." *Id.* In *American Grape Growers,* the court adopted and incorporated the interpretation of cumulation set out in *Republic Steel Corp. v. United States,* 8 C.I.T. 29, 591 F. Supp. 640 (1984) finding that "[a]rticles which compete with a like product must compete with each other." 9 C.I.T. at 400, 615 F. Supp. at 606. Superficial distinctions, such as those used in advertising, should not be used to avoid cumulation.

In regard to the second issue, the court found that the ITC "use[d] an excessively stringent standard for determining the possibility of injury," in reaching its negative preliminary determination. *American Grape Growers,* 9 C.I.T. at 401, 615 F. Supp. at 607.[9] It held that the petitioners' burden was not one of ultimate proof, but "simply the burden of *raising* the issue of injury, not the burden of proving injury," 9 C.I.T. at 402, 615 F. Supp. at 608,[10] incorporating the analysis in *Republic Steel v. United States, supra.*

The ITC filed a notice of appeal from the court's decision on August 15, 1985, and a motion for stay of enforcement of the final judgment pending disposition of the appeal shortly thereafter. On October 5, 1985, this court denied the ITC's request for a stay. *American Grape Growers v. United States,* Slip Op. 85-104, 7 I.T.R.D. 1461 (October 7, 1985). The ITC sought a stay pending appeal of this court's August 8, 1985 judgment, which was denied by the CAFC on November 22, 1985. On that day, this court granted plaintiffs' motion seeking an order enforcing the court's August 8, 1985 judgment. *American Grape Growers v. United States,* 9 C.I.T. 568, 622 F. Supp. 295 (1985).[11]

The CAFC's November 22, 1985 order ruled on various motions pending in this matter before that court. In addition to the denial of the ITC's motion to stay proceedings. the CAFC (1) granted Banfi Products Corp.'s motion to consolidate appeals;[12] (2) stayed any proceedings in this appeal pending decision of the related issue in *American Lamb v. United States;* (3) granted appellants forty days after the *American Lamb* decision in which to file or refile briefs, to be followed by the normal briefing schedule, and; (4) granted the American Association of Exporters and Importers' motion to file a brief *amicus curiae. See*

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[9] The court found that at this early stage of investigation, "the ITC became involved in the full analysis of complex, conflicting and incomplete data," rather than more appropriately "concentrating * * * on the limited, relatively simple question of whether there is a *possibility* of injury." *Id.*

[10] In this case, the court found that "preliminary determinations constituted prejudgments of questions which the parties are entitled to have investigated fully and fairly in the stages provided by law." *Id.*

[11] In its November 22, 1985 opinion, this court directed the ITC to make preliminary determinations in this matter by applying the "possibility of injury" standard set out in this court's August 8, 1985 decision. On December 3, 1985, the ITC made preliminary affirmative injury determinations .

[12] Defendant-intervenor Banfi Products Corp. is a United States importer of Italian wine. The appeals, which were consolidated into appeal No. 85-2717, were No. 85-2717 (the ITC's appeal to the CAFC from this court's August 8,1985 decision), and No. 86-556 (Banfi's appeal from the same).

American Lamb Co. v. United States, 785 F.2d 994, 998 n. 4 (Fed. Cir. 1986).

Following the February 28, 1986 decision in *American Lamb*, the ITC and Banfi Products moved the CAFC to remand the case to this Court, with instructions to vacate its August 8, 1985 judgment. The CAFC did so on April 29, 1986, ordering this court to reconsider its judgment in light of *American Lamb*. On June 18, 1986, plaintiffs moved this court to reinstate its reversal of the ITC's negative determination, modifying its previous judgment "only to the extent necessary to implement the 'reasonable indication of injury standard' articulated by the CAFC in *American Lamb*." Plaintiffs' Motion to Reinstate Judgment of Reversal at 4. Plaintiffs also moved the court to establish a briefing schedule, and the court granted that motion on December 7, 1987.[13]

Discussion

At this juncture, two issues require determination. The first, concerning the standard to be applied by the ITC in reaching its preliminary determination, has essentially been determined by *American Lamb*. The second, concerning cumulation, remains to be determined by this court. The court sees no reason to disturb its previous ruling, which ordered the ITC to cumulate table wines from France and Italy before determining whether there was a reasonable indication of material injury, or threat of material injury to the domestic wine industry.

In *American Grape Growers*, this court reversed the ITC's determination that "there was no 'reasonable indication' that the imports of table wine, allegedly subsidized and sold here at less than fair value, were the source of material injury or threat of material injury to an industry in the United States." 9 C.I.T. at 397, 615 F. Supp. at 604. First, we will address the finding that "the determinations [were] subject to * * * an excessively stringent standard for determining the possibility of injury." 9 C.I.T. at 401, 615 F. Supp. at 607.

In *American Grape Growers*, this court held, "[i]nstead of concentrating at this early stage on the limited, relatively simple question of where there is a *possibility* of injury, the ITC became involved in the full analysis of complex, conflicting and incomplete data." *Id.* This was found to be inconsistent with the law, which the court interpreted as requiring merely that in finding "no reasonable indication of injury the ITC [must] say, in effect, that the information before it does not raise the *possibility of injury* to the domestic industry." *Id.* (emphasis supplied) Thus, the more rigorous standard, requiring a "full scale investigation" and "causation analysis," was rejected. The court found that the ITC's "preliminary determinations constituted prejudgments of questions which the parties are entitled to have investigated fully and fairly in the stages provided by law," resulting in the loss of "any meaningful

[13] Plaintiffs' motion for additional briefing was opposed by the ITC.

difference between this determination and a final determination." 9 C.I.T. at 402, 615 F. Supp. at 608.

In reaching its decision, this Court relied on its previous determination in *Republic Steel,* which held:

> The object of these determinations should have been simply to find whether there were any facts which raised the possibility of injury. The resolution or interpretation of conflicting facts should have been reserved for a possible final injury determination.

8 C.I.T. at 40, 591 F. Supp. at 650 (emphasis omitted). The court applied the same standard to the determination of the threat of injury. 8 C.I.T. at 40–41, 591 F. Supp. at 650–51. In fact, it found that "because the evidence needed to support the indication of threat is more difficult to obtain than evidence of actual injury, it is reasonable to predicate the need for further investigation of a threat on the barest indications." 8 C.I.T. at 41, 591 F. Supp. at 651.

That aspect of *American Grape Growers* was overruled by the CAFC in *American Lamb.* The court of appeals vacated the Court of International Trade's (CIT) order in *American Lamb Co. v. United States,* 9 C.I.T. 260, 611 F. Supp. 979 (1985), which relied upon the same standard used by this court in *American Grape Growers.*[14] In *American Lamb,* the CIT stated that the ITC:

> may not weigh conflicting evidence in making a preliminary determination that material injury or the threat of material injury exists; in a preliminary investigation, the Commission's responsibility is simply to find whether any facts reasonably raise the possibility of injury.

9 C.I.T. at 262, 611 F. Supp. at 980.

The CAFC found that since its earliest investigations under the Trade Act of 1974, the ITC has:

> determin[ed] that there is no "reasonable indication" of material injury or threat when: (1) there is clear and convincing evidence of the absence of such reasonable indication; and (2) the record shows it extremely unlikely that evidence of a "reasonable indication" would be developed in a final investigation.

785 F.2d at 996. The CAFC rejected the CIT's mere possibility standard, finding that while the reasoning may itself be acceptable, it was not in accord with the statute. In so holding, the CAFC determined that "[t]he statute calls for a reasonable indication of injury, not a reasonable indication of need for further inquiry." *Id.* at 1001.

Finally, the CAFC in *American Lamb* determined that while the ITC's negative preliminary determinations are reviewable by the CIT, the increased difficulty in "overturn[ing] a negative preliminary determination when ITC had weighed conflicting evidence cannot be a factor in

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[14] In *American Lamb,* the CIT relied upon the standard of review set out by this court in *Republic Steel Corp. v. United States,* 8 C.I.T. 29, 591 F. Supp. 640 (1984), as well as in *Jeannette Sheet Glass Corp. v. United States,* 9 C.I.T. 154, 607 F. Supp. 123 (1985).

evaluating the permissibility of ITC's method of determining the presence or absence of a 'reasonable indication' of injury or threat of injury." *Id.* at 1004. Thus, *Republic Steel* and its progeny are overruled to that extent.[15]

In seeking reinstatement of the judgment of reversal, plaintiffs claim that the threshold of proof required by *American Lamb* would not produce a different result in this action than that previously reached by this court. *See* Plaintiffs' Motion to Reinstate judgment of Reversal. The claim that while the current standard allows the ITC to weigh evidence in reaching its preliminary investigation, it must still "conduct a thorough and careful inquiry into the allegations of injury set for the * * * and all of the facts" which support that allegation.

The court does not agree with plaintiffs contentions, inasmuch as it did not previously find that the ITC did not "conduct a thorough and careful inquiry." The effect of *American Lamb,* in this case, alters the standard which the ITC may apply in reaching its preliminary determination. It does not alter the power or role of this court in reviewing those determinations.

In *American Grape Growers,* this court concluded that the ITC's preliminary determinations "were not in accordance with the law." 9 C.I.T. at 397, 615 F. Supp. at 604. The statute provides, "[t]he court shall hold unlawful any determination, finding, or conclusion found (A) in an action brought under paragraph (1) of subsection (a) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *" 19 U.S.C. § 1516a(b)(1)(A).

In *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281 (1971), the United States Supreme Court defined the "arbitrary and capricious" standard as providing a narrow scope of review. The Supreme Court held that a reviewing court must consider whether an agency's decision is based upon and considers the relevant factor, and whether there is a clear error of judgment.[16] If the agency meets the requirement of articulating a '"rational connection between the facts found and the choice made,"' *id.* at 285 (*citing Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)), and "the agency's path may be reasonably discerned," *id.* at 286, the court may not substitute its own judgment for that of the agency.

It is clear that in reviewing agency determinations, this court must be "deferential to the [agency's] determinations, findings and conclusions." *Jeannette Sheet Glass Corp. v. United States.* 11 C.I.T. 10, 15, 654 F. Supp. 179, 183 (1987). In *Jeannette Sheet Glass,* the court held, "this court is not permitted to itself weigh the evidence and substitute

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[15] For other cases in which the standard set out in *American Lamb* is applied, *see Yuasa-Gen. Battery Corp. v. United States,* 12 C.I.T. 624, 688 F. Supp. 1551 (1988); *Maverick Tube Corp. v. United States,* 12 C.I.T. 444, 687 F. Supp. 1569 (1988); *Wells Mfg. Co. v. United States,* 11 C.I.T. 911, 677 F. Supp. 1239 (1987); *Jeannette Sheet Glass Corp. v. United States,* 11 C.I.T. 10, 654 F. Supp. 179 (1987).

[16] *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

its judgment for that of the agency, even though had the matter been raised initially before the court its decision may have been different." *Id.* The court stated:

> not only must the court avoid substituting its judgment for that of the agency, it may reverse the agency's action only where there is "a clear error of judgment" and where there is no rational nexus between the facts found and the choices made."

Id. (citations omitted.) *See also Wells Manufacturing Co. v. United States,* 11 C.I.T.911, 919–20, 677 F. Supp. 1239, 1245–46 (1987).

The CAFC found that even "the lack of an explicit statement in the agency's published notices * * * has prevented neither the trial court nor this court from discerning the path of the agency in its decision-making process." *Ceramica Regiomontana, S.A. v. United States,* 810 F.2d 1137, 1139 (Fed. Cir. 1987). Where the clarity of an agency's decision is less than ideal, it may nevertheless be upheld by the court if its path may be reasonably discerned. In this case, pertaining to the issue of "whether or not the ITC applied an erroneous legal standard in determining that there was no 'reasonable indication' of injury or threat of injury." *American Grape Growers,* 9 C.I.T. at 397, 615 F. Supp. at 604, the agency's path is discernible. This court has not ruled otherwise. Rather, the court had held that the ITC applied an incorrect standard, a determination which was vacated by the court of appeals.

The ITC summarized the results of its investigations as follows:

> Although some domestic producers of ordinary table wine are experiencing financial problems, we do not find a reasonable indication of a causal connection between any such problems and the subject imports. Specifically, the volume and market share of imports from France are very small, and there is no evidence on the record of significant underselling, or of price suppression or lost sales by reason of imports from France. The volume of imports from Italy is significant, but their share I of the U.S. market has remained flat during the 1981–83 period under investigation. Furthermore, there is no evidence on the record of significant underselling, or of – price suppression or lost sales by reason of imports from Italy.

Certain Table Wine from France and Italy, USITC Pub. 1502, Inv. Nos. 701-TA-210 and 211 (preliminary), and 731-TA-167 and 168 (preliminary) (March 1984).

This court is satisfied with the analysis provided in the ITC determination results, and accepts its findings to the extent that the ITC applied the standard set out in *American Lamb* to its results in these preliminary determinations regarding certain table wine from France and Italy. As in *Armstrong Bros. Tool Co. v. United States,* 489 F. Supp. 269 (Cust. Ct. 1980), plaintiffs "essentially challenge discretionary findings by the [ITC]. *Id.* at 278. In *Armstrong Bros.,* the Customs Court stated:

> [I]t is not the function of the court in reviewing an injury determination of the commission under the Antidumping Act to weigh the evidence or substitute its judgment for that of the commission * * *

> Despite our daily diet of challenges to administrative agency action and our resulting repeated efforts to articulate the limits of judicial review of such actions we nevertheless are continually called upon to substitute our judgment on factual issues for that of the agency charged by congress with the initial responsibility of making, evaluating, and acting upon those facts. *It is well settled that the fact-finding function is within the exclusive province of the administrative agency.*

Id. Here also, this court finds "it would be impermissible * * * to substitute [the court's] judgment for that of the commission or to re-weigh the evidence as to specific factual findings." *Id.* at 278–79.

That is not the case, however, in regard to the ITC's decision not to cumulate the subject imports from France and Italy in reaching its determinations. In its results, the ITC stated that they did "not find it appropriate to cumulate the imports from Italy and France in making our determination." Certain Table Wine from France and Italy at 15 n.48. The reasoning is:

> The commission has the discretion to consider the combined impact of allegedly unfair imports "only when the factors and conditions of trade show its relevance to the determinations of injury * * *." In Certain Carbon Steel Products From Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom, Invs. Nos. 731-TA-18-24 (P) USITC Pub. No. 1064 (1980), the commission majority used a cumulative analysis to combine imports whose share of the market was otherwise insignificant because the subject imports were "comparable and compete in the same markets[,]"* * * thereby exhibiting a collective "hammering" effect on the domestic industry disproportionate to the imports market share alone. The factors considered relevant included: the fungibility of the subject imports, the markets affected by the various imports,volume and trends of the imports, marketing practices of each country, market shares, pricing practices, inventory practices, and the presence or absence of coordinated action.

Id. (citations omitted).

The ITC goes on to state:

> In these investigations, imports from France are concentrated in the traditionally vinified white wine category; most of the imports from Italy are of the sweet, effervescent, Lambrusco-type wines discussed *supra.* In addition, imports from these respective countries are generally marketed by separate groups of importers. For these reasons, we do not believe that imports from Italy and France are exhibiting a collective "hammering effect" on domestic wine prices such that consideration of their combined effect is necessary or appropriate. Furthermore, even had we cumulated these imports, it would not have changed the result of our analysis.

Id.

The court again rejects the ITC's perfunctory dismissal of any reason to cumulate the subject imports, particularly its finding that "even had

we cumulated * * *, it would not have changed the result of our analysis." The level of conjecture evident in such a statement is inappropriate and unacceptable.

In *American Grape Growers,* this court found "the decision not to cumulate was erroneous because it depended on a depth of analysis and specificity of information which is unreasonable to expect, and unlawful to demand, in the preliminary phase of the investigation." 9 C.I.T. at 398, 615 F. Supp. at 605. The court recognizes the relationship between that finding and the reasoning which has since been overruled by *American Lamb.*[17] Thus, the court's order requiring the ITC to cumulate on that basis must fail.

However, the court provided further reasoning for its order to cumulate which is not affected by *American Lamb.* It remains "error for the ITC to make the standard of competition needed to justify cumulation of the imports subject to investigation more rigorous than the standard used for matching the domestic product with the imported product." *Id.* The court refers to its findings in the earlier opinion, and its incorporation, then and now, of the cumulation analysis set out in *Republic Steel Corp. v. United States,* 8 C.I.T. 29, 591 F. Supp. 640 (1984).

In determining in *American Grape Growers* that "[c]umulation should not be avoided by the sort of superficial product distinctions that are made in advertisements," the court rejected the notion that the decision to cumulate should be controlled by the ever present ability "to develop rational distinctions between products in terms which ultimately relate to questions of consumer taste." 9 C.I.T. at 400, 615 F. Supp. at 606. Then as now, the court finds that in this case, cumulation is necessary to facilitate a meaningful determination of injury, or threat of injury.[18]

The Tariff Act of 1930, as amended, defines "like product" as, "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle." 19 U.S.C. 1677(10) (1980). The court finds that the subject imported ordinary table wines in this investigation are "like products."

At the time of this investigation, there was no specific statutory provision for cumulation. Since then, the statute has been amended to address cumulation as follows:

> For purposes of clauses (i) and (ii) [volume and price], the commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

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[17] The court held "that the ITC has inflated the preliminary determination into an investigative evaluation of conflicting or incomplete material far beyond the intention of the law." *Id.*

[18] The court reasserts its previous finding that in the context of a preliminary determination, "[i]t is unreasonable to demand that the products be fungible, unreasonable to require coordinated action and unreasonable at this early stage to engage in the measurement and weighing of a host of conflicting and ambivalent marketing and pricing factors." 9 C.I.T. at 400, 615 F. Supp. at 607.

19 U.S.C. § 1677(7)(c)(iv) (1984). Although this clause was not enacted at the time, and thus does not apply in the instant investigation, it does present some assistance in understanding the direction of the law in this area.

In *Republic Steel*, this court held that, "the proper test for cumulation is whether subsidized or allegedly subsidized imported products are competing with the product of a domestic industry during a period when the effect of these importations is being felt by the domestic industry." 8 C.I.T. at 34, 591 F. Supp. at 645. That test applies in this case and, as stated in our previous opinion, *see American Grape Growers v. United States*, 9 C.I.T. at 399–400, 615 F. Supp. at 606–07, these subject imports meet that test, and should have been cumulated.

This determination is supported by case law in the area, both prior and subsequent to the 1984 implementation of the statutory definition.[19] In *Jeannette Sheet Glass Corp. v. United States*, 9 C.I.T. 154, 607 F. Supp. 123 (1985), *on reconsideration, vacated in part and adhered to in part*, 11 C.I.T. 10, 654 F. Supp. 179 (1987), the court recognized *Republic Steel's* holding, "that the proper test for cumulation is whether the imported products are competing with the product of a domestic industry and not the volume or trend in the volume of a particular segment of importations." *Id.* at 130.

In more recent cases,[20] the court has determined that cumulation is appropriate where "there is sufficient evidence of a reasonable overlap in competition." *Wieland Werke, AG v. United States*, ____ C.I.T. ____, 718 F. Supp. 50, 62 (1989).[21] The cumulation provision of the statute has been interpreted as requiring the ITC to "cumulate the volume and price effects of imports in its material injury analysis when the imports compete with each other and with the domestic like product." *Metallverken Nederland B.V. v. United States*, ____C.I.T. ____,728 F. Supp. 730, 741 (1989). In *Granges Metallverken AB v. United States*, ____C.I.T. ____, 716 F. Supp. 17 (1989), the court held:

> The commission need not track each sale of individual sub-products and their counterparts to show that all imports compete with all other imports and all domestic like products. Rather, the commission need only find evidence of reasonable overlap in competition to support its determination to cumulate imports.

____C.I.T.at ____,716 F.Supp at 22. Further, completely overlapping markets have not been required to sustain cumulation. *Florex v. United States*, ____ C.I.T. ____, ____, 705 F. Supp. 582, 592 (1989).

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[19] For discussion of statutory background, *see Chaparral Steel Co. v. United States*, 12 C.I.T. 873, 698 F. Supp. 254, 258–60 (1988), rev'd, 901 F.2d 1097 (Fed. Cir. 1990); *LMI - La Metallurgica Industriale. S.p.A. v. United States*, ___ C.I.T. ___, 712 F. Supp. 959, 964–7, (1989), *aff'd in part and rev'd in part*, 912 F.2d 455 (Fed. Cir. 1990).

[20] Although the codification of cumulation which is applied in these cases does not apply to the case at bar, the similarity of the principle causes these cases to be helpful in this analysis. Further, the cases themselves rely upon prior cases decided before the statute was amended to include cumulation.

[21] For a discussion of *Wieland Werke* and an overview of cumulation, *see* Recent Developments, *Imports-Cumulation and Unfair Trade Competition-Cumulation Deemed Proper When a "Reasonable Overlap" of Competition Exists*, 19 Ga. J. Int'l & Comp. L. 639 (1989).

The CAFC has recognized the cumulation of goods from more than one country by the ITC in determining material injury. *Fundicao Tupy S.A. v. United States,* 859 F.2d 915, 917 (Fed. Cir. 1988). The court of appeals affirmed the CIT ruling, which found that the language of the 1984 cumulation provision did not conflict with the "basic causation provision of the Tariff Act of 1930," and "presents no conflict with other provisions of the law, and is in harmony with the intention of Congress." *Fundicao Tupy S.A. v. United States,* 12 C.I.T. 6, 678 F. Supp. 898 (1988), *aff'd,* 859 F.2d 915 (Fed. Cir. 1988). Again, although not directly controlling, the post-1984 cases offer significant insight into Congress' intention in this area, which assists us where "[p]rior to the 1984 Act, the commission's cumulation practice was characterized by internal inconsistency and confusion." *Bingham & Taylor Div., Virginia Industries, Inc. v. United States,* 815 F.2d 1482, 1485 (Fed. Cir. 1987).

Even where the court found that the ITC was not required to cumulate, it recognized, "*Republic Steel* held that in a preliminary countervailing duty determination, cumulation was essential to determine the possibility of material injury." *Gifford Hill Cement Co. v. United States,* 9 C.I.T. 357, 374, 615 F. Supp. 577, 590 (1985). *See also Lone Star Steel Co. v. United States,* 10 C.I.T. 731, 734, 650 F. Supp. 183, 186 (1986). In other cases, cumulation was successfully and properly avoided where the ITC's decision not to cumulate was reasonable and based on substantial evidence. *See Marsuda-Rodgers Int'l v. United States,* ___C.I.T. ___, 734 F. Supp. 1019 (1990); *Asociacion Colombiana de Exportadores de Flores v. United States,* 12 C.I.T. 1174, 704 F. Supp. 1068 (1988); *USX Corp. v. United States,* 12 C.I.T. 844, 698 F. Supp. 234 (1988). That is not the case here.

Plaintiff argues "[b]oth trade law and the need for accuracy requires that the commission cumulate the French and Italian imports of ordinary table wine." Brief in Support of its Motion to Reinstate Judgment of Reversal at 24. As indicated in the court's previous ruling in this case, we agree. The fact that the ITC's determinations on cumulation were discretionary prior to the 1984 cumulation provision does not alter our previous finding that its failure to cumulate in this case was an abuse of that discretion. No argument presented by defendant United States, or defendant-intervenors, persuades the court otherwise.

CONCLUSION

Plaintiffs motion to reinstate judgment of reversal is denied. Upon reconsideration of this matter in light of *American Lamb,* this court again remands this matter to the ITC for its redetermination pursuant to this Memorandum Opinion and Order. The ITC's December 3,1985 affirmative preliminary injury determinations, made pursuant to this court's previous, now vacated order, should itself be vacated. Accordingly, the ITC should conduct preliminary countervailing duty and antidumping investigations in this matter, pursuant to statute, applying the standard for determining the possibility of injury established by *American Lamb.*

In conducting its investigation the ITC shall cumulate the subject imports, i.e.,ordinary table wine from France and Italy.

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C91/177 7/9/91 Tsoucalas, J.	Canon USA, Inc.	88-7-00561	389.62 10% + $0.04 per lb. or 9%
C91/178 7/9/91 Aquilino, J.	E. Gluck Corp.	84-1-00098	716.09–716.45, 715.15, etc., Various rates
C91/179 7/9/91 Aquilino, J.	E. Gluck Corp.	84-3-00463	716.09–716.45, 715.05, etc., Various rates
C91/180 7/9/91 Aquilino, J.	E. Gluck Corp.	84-5-00673	716.09–716.45, 715.15, etc., Various rates
C91/181 7/9/91 Aquilino, J.	E. Gluck Corp.	85-8-01153	716.09–716.45, 715.15, etc., Various rates

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
r	676.50 4.7% or 4%	Agreed statement of facts	Los Angeles Typewriter ribbon spools and/or cassettes
	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C91/182 7/9/91 Aquilino, J.	E. Gluck Corp.	85-10-01512	716.0 71 Va
C91/183 7/9/91 Aquilino, J.	E. Gluck Corp.	85-12-01735	716.0 71 Va
C91/184 7/9/91 Aquilino, J.	E. Gluck Corp.	86-4-00420	716.0 71 Va
C91/185 7/9/91 Tsoucalas, J.	Gelmart Industries, Inc.	89-7-00393	376.2 32
C91/186 7/10/91 Goldberg, J.	Canon USA, Inc.	89-2-00107	389.0 10 $0 9%
C91/187 7/10/91 Goldberg, J.	Elbe Products	89-1-00026	355.3 Va
C91/188 7/10/91 Goldberg, J.	Garland Commercial Indus., Inc.	90-3-00111	8516 5.3 7321 4.5 7313 3.4 7326 5.1

.09–716.45, 15.05, etc., arious rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
.09–716.45, 15.05, etc., arious rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
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.24 2%	376.28 18%	Gelmart Industries, Inc. *v.* U.S., 11 CIT 70 (1987)	New York Brassieres
.62 0% + 0.04 per lb. or %	676.50 4.7% or 4%	Agreed statement of facts	Seattle Typewriter ribbon spools and/or cassettes
.25 arious rates	359.60 Various rates	Elbe Products Corp. *v.* U.S., 11 CIT 518 (1987), *affid,* 846 F.2d 743 (1988)	New York Viledon
6.60.60 .3% 1.11.60 .2% 3.93.00 .4% 6.90.90 .7%	8419.81.50, Free of duty 8419.81.90 4.1% 8419.90.90 4.2%	Agreed statement of facts	Buffalo Commercial cooking equipment

ABSTRACTED CLASSIFICAT

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESS
C91/189 7/10/91 Aquilino, J.	Sonic Int'l Corp.	90-3-00152	716.09–716 715.05, e Various
C91/190 7/10/91 Goldberg, J.	Zayre Corp.	87-9-00948	700.57 37.5%

TION DECISIONS – Continued

SSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
6.45, etc., rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
	700.56 6%	Agreed statement of facts	Boston PVC jogger shoes

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